JAKOB RENNER & ORS *a*

v.

SCOTT KING, CHAIRMAN OF BOARD OF DIRECTORS OF THE INTERNATIONAL SCHOOL OF KUALA LUMPUR & ORS *b*

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT3-24-969-1999]
4 NOVEMBER 1999

CIVIL PROCEDURE: *Injunction - Temporary injunction - Ad interim Injunction - Pending disposal of application for interlocutory injunction - Jurisdiction of court* *c*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Mandatory interlocutory injunction - Balance of justice - Educational needs of child - Exceptional, rare and special case* *d*

The 1st plaintiff suffered from moderate spastic dipelgia. After completing his elementary school at the Melawati campus of the defendants' school, he was expected to be transferred to the Ampang campus for his middle school. However, he was denied entry to the Ampang campus due to his physical disability. The plaintiffs appealed to the defendants' board but it was rejected. The plaintiffs then filed an application for an interlocutory injunction restraining the defendants and/or their servants/agents from excluding, preventing, precluding or hindering the 1st plaintiff from attending and commencing middle school at the Ampang campus. Immediately after filing this application, counsel for the plaintiffs applied for an *ad interim* injunction. *e* *f*

Held:

[1] In line with the powers of the High Court under s. 25 Courts of Judicature Act 1964 and the additional powers under para 6 of the Schedule to the same Act, it is within the jurisdiction of the superior courts to grant an *ad interim* injunction pending the disposal of an application for an interlocutory injunction. *g*

[2] Although it was apparent that financial expenditure in making the defendant school disabled-friendly was a principal factor in excluding the 1st plaintiff, but as a matter of law and justice, financial considerations must take a back seat and give way to disabled childrens' basic right to education. *h*

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[3] Where the overriding educational needs of a child is likely to be threatened, it will necessitate the tilting of the balance of justice in favour of providing continuance of education for the affected child.

[4] As the facts and circumstances of this case were exceptional, rare and special, the court would exercise its discretion in granting the mandatory interlocutory injunction.

[Interlocutory injunction granted.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Bradbury v. London Borough Of Enfield [1967] 3 All ER 434 ***(refd)***
Cayne & Anor v. Global Natural Resources Plc [1984] 1 All ER 245 ***(refd)***
Community School District v. Garret 143 L Ed 2d 154:67 ***(refd)***
Dato' Jaafar Mohd Ali & Anor v. Jasatera Bhd & Ors (High Court, Shah Alam; Suit No: MT3-22-438-99) ***(refd)***
Gibb & Co v. Malaysia Building Society Bhd [1982] 1 MLJ 271 ***(refd)***
Guardians Of The Poor Of Gateshead Union v. Durham County Council [1918] 1 Ch D 146 ***(refd)***
Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor [1995] 5 CLJ 376 ***(refd)***
Jagjit Singh Khanna v. Dr Rakhal Das Mullick & Anor AIR [1988] Calcutta 95 ***(foll)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah [1995] 1 CLJ 293 ***(refd)***
Leisure Farm Corpn Sdn Bhd v. Syarikat Kemajuan Kim Yon Sdn Bhd [1990] 1 MLJ 44 ***(refd)***
NWL Ltd v. Woods; NWL Ltd v. Nelson & Anor [1979] 3 All ER 614 ***(refd)***
R v. East Sussex County Council ex p Tandy [1998] 2 All ER 769 ***(foll)***
R v. Governing Body Of Dame Alice Owens School, ex p S (Lexis 1997 No 6.52) ***(refd)***
Re Hogan Et Al & School Boards For Ten Districts Et Al, Newfoundland [1997] 149 DLR 4th 468 ***(foll)***
See Teow Chuan & Anor v. Yam Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [1997] 7 CLJ Supp 195 ***(refd)***
Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***
Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd [1987] 1 CLJ 474 ***(refd)***
TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd [1984] 1 CLJ 303 ***(foll)***
Wilford v. County Council Of The West Riding Of Yorkshire [1908] 1 KB 685 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25
Federal Constitution, arts. 5, 8

For the plaintiffs - Dr Cyrus Das (Steven Thiru with him); M/s Shook Lin & Bok
For the defendants - Lim Kean Chye (GL Ambrose & Nicole Wee with him); M/s Chooi & Co

Reported by Izzaty Izzuddin

JUDGMENT

Low Hop Bing J:

Application

The concern for the education of our younger generation strikes at the very core of our hearts, especially in the promotion of a caring and loving society. This concern is manifested in the proceedings which were unfolded in this court. Before me is the plaintiffs' application in encl. (2) for an interlocutory injunction to restrain the defendants and each of them whether by themselves or their servants or agents from excluding, preventing, precluding or hindering the 1st plaintiff from attending and commencing middle school at the Ampang campus of the defendant school when the school commences on 12 August 1999.

After the filing of encl. (2), Dato' Dr. Cyrus Das, the learned lead counsel for the plaintiffs, applied for the grant of an *ad interim* injunction. After perusing the application in encl. (2) and all the affidavits filed herein, I granted the *ad interim* injunction, on the basis of the decision of the Court in India ie, *Jagjit Singh Khanna v. Dr Rakhal Das Mullick & Another* AIR [1988] Calcutta 95 where a panel of two judges presided. A.M. Bhattacharjee, J (in delivering the judgment of the court) explained the two stages of a temporary injunction in the following words:

> A temporary injunction may as it very often does, consist of two stages, one granted without finally disposing of the application for injunction to operate immediately till the disposal of the said application and the other granted while finally disposing of the main application to endure generally till the disposal of the suit and while the former is generally classed as *ad interim* injunction, the latter is generally called temporary injunction. Neither on principle nor on authority we find any bar to the Courts granting *ad interim* injunction till the disposal of the application for the temporary injunction.

Applying the principle enunciated in the above case, I am of the view that it is within the jurisdiction of our superior courts to grant *ad interim* injunction pending the disposal of an application for interlocutory injunction, such as encl. (2) in the instant case. This view is in line with the powers of the High Court under s. 25 of the Courts of Judicature Act 1964 and the additional powers under para. 6 of the schedule to the same Act which include the power to grant injunction in any manner whatsoever.

Facts Of The Case

From the respective submissions of learned counsel for the parties herein, the facts and circumstances for the purposes of the application in encl. (2) may be presented in this way:

Jakob, the 1st plaintiff, suffers from a mild form of spastic dipelgia that only affects his motor movements. It is called moderate spastic dipelgia.

He is intellectually normal with a mental development which is commensurate to his chronological age.

Jakob uses a wheel chair to move about and a walking frame if he intends to walk by himself.

By grade 5 in elementary school, Jakob had become independent in five essential areas *viz*:

(a) movement around the school;

(b) using the lift by himself;

(c) independence in the cafeteria;

(d) to attend class on time; and

(e) going to toilet independently.

The defendant school is one school with two campuses *viz* the Melawati campus for elementary school children and Ampang campus for middle school and college level students.

The Ampang campus is sufficiently disabled-friendly like the Melawati campus in three essentials:

(a) existence of ramps;

(b) elevator to all levels; and

(c) washroom for disabled persons.

Jakob's parents, the 2nd and 3rd plaintiffs, are both teachers in the defendant school. The father teaches at the Ampang campus and the mother at the Melawati campus.

The defendant school provides American curriculum education. It receives an annual grant from the United States Government.

American children including Jakob constitute the highest percentage of student enrolment each year.

There was no prior intimation that Jakob would not be allowed to transfer to the Ampang campus along with his 90 other classmates.

The first intimation was a reference in the letter dated 3 February 1999 requesting Jakob's parents to provide documents of his medical suitability to attend the Ampang campus. An evaluation was then purportedly carried out in early 1999.

On 20 April 1999, the defendant School's Board decided to reject Jakob on the ground that he needed "extensive compensatory education, which is not offered at International School Kuala Lumpur, for his physical handicap.".

However, on 21 April 1999, the parents were informed by a letter from the 2nd defendant that the matter was still under consideration and no definite decision had been reached.

Again by letter of 12 May 1999, the 2nd defendant informed Jakob's parents that "the Board" continued to give consideration to Jakob's schooling.

By letter of 18 May 1999, the 2nd defendant purported to reject Jakob as if it were his sole decision. The parents were subsequently told to appeal to the Board.

The Board purportedly heard the appeal on 1 June 1999 and rejected it on 4 June 1999.

As a result, Jakob's schooling would have terminated, having been denied entry to the Ampang campus and the parents left to make their own arrangements for his continued schooling. Nevertheless, that predicament was prevented or averted by this court granting the aforesaid *ad interim* injunction.

Submission For Plaintiffs

At this interlocutory stage, it was submitted for the plaintiffs that the plaintiffs' burden is two-fold, namely, to establish that there are serious questions to be tried and secondly, that the balance of convenience lies in favour of granting the interlocutory injunction as prayed for in encl. (2). On the serious questions to be tried, it was contended that these questions are founded on the legitimate expectation of the 1st plaintiff to be allowed to continue with the secondary level, having successfully completed the primary level. It was said that the defendants had misconstrued their own admission policies and hence there was a violation of arts. 5 and 8 of our Federal Constitution.

The defendants, according to the plaintiffs, had not exercised procedural fairness in refusing to admit the 1st plaintiff to the school. It was argued that Malaysia being a signatory to the International Convention on the Rights of the Child 1989 should give effect to its provisions. Further, in the view of the plaintiffs' learned counsel, the provisions of the United States Individuals with Disabilities Education (1997 Revisions) Act would apply here. On the issue of balance of convenience, it was submitted for the plaintiffs that it leans in favour of the 1st plaintiff who must not be denied his basic rights to education which is a paramount consideration.

Response By The Defendants

On the question of legitimate expectation, it was contended by Mr. Lim Kean Chye, learned lead counsel for the defendants, that this doctrine applies to a right to be heard and not an automatic right to the claim and so has no application in this case.

The defendants added that there was no question of any misconstruction on the part of the defendants in relation to their admission policy. It was also argued for the defendants that arts. 5 and 8 of the Federal Constitution do not apply to the 1st plaintiff who is not a Malaysian citizen. The International Convention on the Rights of the Child and the United States Individuals with Disabilities Education (1997 Revisions) Act are, in the view of the defendants' learned counsel, not relevant in Malaysia.

It was further contended that justice of the case does not favour the grant of the interlocutory injunction.

Also canvassed was the issue that the matter before the court is not justiciable as the court's function does not extend to moral, social or political matters. Hence, it was said that changes must be made to Malaysian law in order to put into effect the provisions of International Conventions and US laws. Finally, it was urged that the mandatory nature of the interlocutory injunction would require the plaintiffs to prove an unusually strong case, which the plaintiffs have failed to do here.

Decision Of The Court

Functions Of A Judge In Interlocutory Injunction

In *See Teow Chuan & Anor v. Yam Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors* [1997] 7 CLJ Supp 195; [1999] 3 AMR 3739, in relation to the functions of a judge hearing an application for interlocutory injunction, I made the following observations:

> The functions of a judge hearing an application for interlocutory injunction had been enunciated by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, and recently restated by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 AMR 373, at pp. 390-391, as follows:
>
> (a) He should ask himself whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. If he finds that no serious question is disclosed, the relief should be refused. If however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(b) Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by the grant, against the harm that would result from its refusal; and

(c) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result between the date of the application and the trial proper and to maintain the *status quo.*

(See also *Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor* [1995] 5 CLJ 376, 390 and *Dato' Jaafar bin Mohd Ali & Anor v. Jasatera Berhad & 5 Ors* (unreported judgment delivered on 29 October 1999 in Shah Alam High Court Suit No: MT3-22-438-99).

(a) Serious Questions To Be Tried

At this stage of the interlocutory application, I am mindful of the principle that the pleadings and evidence are incomplete and so I must refrain from making any determination on the merits of the claim or any defence to it. It is therefore not the function of the court to come to any specific finding of facts or any conclusion on the merits of the matter: *American Cyanamid Co v. Ethicon Ltd; Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor supra; Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah, supra; Dato' Jaafar bin Mohd Ali & Anor v. Jasatera Bhd & 5 Ors, supra.*

Having properly perused and carefully considered the plaintiffs' affidavits in support and the defendants' affidavits in reply, I am of the view that the following issues are *bona fide* serious questions to be tried:

(i) Whether the matter before this court is justiciable?

(ii) Whether the evaluation purportedly carried out by the defendants in early 1999 and/or the purported refusal to admit the 1st plaintiff were procedurally and substantively fair?

(iii) Whether the matter relating to the placement of the 1st plaintiff in the defendant school is a transfer or a fresh admission?

(iv) Whether the defendant school had misconstrued its own admission policies or read it in a discriminatory manner against the 1st plaintiff?

(v) Whether art. 8 of our Federal Constitution applies to the 1st plaintiff and if so, whether there is any discrimination against the 1st plaintiff in relation to the provision of equal education opportunities as seen in the light of art. 8?

(vi) Do the provisions of the International Convention on the Rights of the Child, 1989 have any legal force in Malaysia?

(vii) Do the provisions of the U.S. law, namely, the Individuals with Disabilities Education (1997 Revisions) Act apply to the defendant school?

Since there are numerous *bona fide* serious questions to be tried, it is necessary for me to move on to the next step of my enquiry ie, to consider the justice of the case.

(b) Justice Of The Case

Consideration in respect of the justice of the case would necessitate a careful and proper understanding of the facts and circumstances of the case, not merely on a balance of convenience but on a balance of justice, in particular by avoiding injustice in each case and balancing the risk of doing an injustice to either party: See *NWL Ltd v. Woods; Nwl Ltd v. Nelson & Anor* [1979] 3 All ER 614 HL; as applied in *Cayne & Anor v. Global Natural Resouces Plc* [1984] 1 All ER 245 CA as followed by Abu Mansor J (now FCJ) in *Leisure Farm Corpn Sdn Bhd v. Syarikat Kemajuan Kim Yon Sdn Bhd* [1990] 1 MLJ 44 HC. See also *Dato' Jaafar bin Mohd Ali & Anor v. Jasatera Berhad & 5 Ors, supra.* These principles are now crystallized by our Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 CLJ 293; [1995] 1 MLJ 193 as the balance of justice and would apply both to an application for an interlocutory prohibitory injunction and an application for an interlocutory mandatory injunction, as in the instant case.

I shall now proceed to consider the balance of justice as required by the justice of the case. In my view, the paramount consideration is balancing the injustice which may result to a party either by a grant or refusal of the interlocutory injunction. To achieve this purpose, I reckon the best method is to go through the principles applied in the common law system in which the courts have established the relevant judicial principles governing a number of school cases where injunctions have been issued to prevent actions that would preclude children or a class of children from attending school.

In *Guardians Of The Poor Of Gateshead Union v. Durham County Council* [1918] 1 Ch. D 146, the English Court of Appeal granted an injunction to restrain a local education authority from implementing a policy that would cause a class of children to pay a fee to attend public elementary school, when the education authority's imposition of such a condition was not legally supportable and was indeed inconsistent with the children's statutory right to free education.

In *Bradbury v. London Borought Of Enfield* [1967] 3 All ER 434 CA, a new education policy purported to convert the grammar school system based on selection of pupils into a uniform comprehensive school system. On a complaint by rate payers in eight schools that there was a legal obligation to retain the grammar schools in which children can be enrolled, an injunction was issued so as to keep open the grammar schools for admission of children. The children's educational needs are of paramount importance.

In *Wilford v. County Council Of The West Riding Of Yorkhire* [1908] 1 KB 685, an injunction was granted to prevent the local education authority from implementing a policy that would prevent schools from providing secular education to enrolled children in standards one to three.

In the case before me, it is apparent that financial expenditure in making the defendant school disabled-friendly was a principal factor in excluding Jakob (see the Dennis Larkin Reports of 25 May 1999 and 7 April 1999, encl. (10), exhs. SK-5 & SK-6). In my view, this is not legally tenable. As a matter of law and justice, financial considerations must take a back seat and give way to disabled children's basic rights to education. I am supported in this proposition by at least three cases, in which the English, American and Canadian Courts have held that schools have to move with the times and become disabled-friendly although this means necessarily incurring extra expenses in these schools. The first case is *R v. East Sussex County Council Ex parte Tandy* [1998] 2 All ER 769, in relation to the schooling of a dyslexic child, the House of Lords held that in determining "suitable education" the financial resources of the local education authority was not a relevant fact. This sentiment is shared by the United States Supreme Court in *Community School District v. Garret FA Minor by his Mother and Next Friend*, Charlene F, 143 L. Ed. 2d. 154:67 which held that the district education authority has to bear the expenses of keeping a handicapped student in school.

Not to be left out is the Canadian case of *Re Hogan Et Al And School Boards For Ten Districts Et Al, Newfoundland* [1997] 149 DLR (4TH) 468, where an interlocutory injunction was granted to prevent the implementation of a policy that abolished uni-denominational schools and created inter-denominational schools. Some Catholic and Presbyterian schools protested saying that unless an injunction was granted a full academic year may pass before the case is heard where the affected students may be denied their right to uni-denominational education. The court further held that this constituted "irreparable harm".

In my view, the principle which may be culled from the above cases is that where the overriding educational needs of children were likely to be threatened, this would necessitate the tilting of the balance of justice in favour of providing continuance of education for the affected children. This is particularly so in Malaysia which is already steadily moving towards a regional centre for educational excellence and is indeed a role model to the developing countries of the world.

In the instant case, the *status quo* is that the 1st plaintiff had already spent six years in the defendant school at the Melawati campus. His continuance in the Ampang campus is indeed the preservation or maintenance of the *status quo,* whereas his exclusion is the alteration of the *status quo.*

The balance of justice makes it clear that the mere presence of an additional child like the 1st plaintiff in the school population of 1,222 would not make a material difference for teaching purposes. It is common ground that Jakob (being cognitively normal) does not need any special teaching facilities that should affect the general teaching organisation of the school. In *R v. Governing Body Of Dame Alice Owens School, Ex parte S* (Lexis, 1997) No. 6.52) the admission by order of court of an additional pupil to a school of 200 students to make it 201 pupils was said not to prejudice the school and that the prejudice to the student was greater if the student was denied admission.

The irreparable harm to the 1st plaintiff's education, and his rehabilitation as a disabled child, is overwhelming if the injunction were to be denied. His education would come to a standstill. The 1st plaintiff is educated in the American curriculum and it is not disputed that the defendant school is best suited in Kuala Lumpur to provide this schooling to him. Home schooling may well be unacceptable as it prevents inter-action and community growth, which are only available in a school environment and which are further crucial for a disabled child like 1st plaintiff to prevent the development of an isolationist syndrome. The exclusion is in my view a personal set-back for 1st plaintiff.

The aforesaid factors would weigh heavily against the defendant school's reasons for denying the 1st plaintiff's education in the defendant school. The balance of justice in my view calls for the 1st plaintiff to continue with his education pending the trial of the case.

I agree with the submission advanced for the plaintiffs that to deny the 1st plaintiff's education because he is physically handicapped is undoubtedly running against the strong current of providing education to the younger generation, especially as we are moving towards the new

millennium. A wheel-chair bound child should not, *ipso facto*, be denied his basic rights to and needs for education. It is not out of place and indeed it is so often illustrated as a universally accepted example that one of the greatest living scientists of our age Professor Stephen Hawkins owed his origin to the exercise of his basic rights to and the need for education. This has made it possible for him to occupy the Newton Chair as Professor of Mathematics at the University of Cambridge. Although he suffers from motor neuron disease and is so severely disabled that he can only speak through a voice activated computer, his immense physical disabilities have not affected his mind. His book called " A Brief History of Time" has far reaching influence in the world of science and has indeed transformed global thinking on physics. It would have been a loss to the world if people like him and by analogy the 1st plaintiff were to be denied education simply because he is physically handicapped or is wheel-chair bound, and the defendant school takes the position that the 1st plaintiff needs "extensive compensatory education".

(c) Mandatory Injunction

I am aware and do appreciate that the interlocutory injunction sought by the plaintiffs in this case is mandatory in substance and effect and so the plaintiffs' case has to be an exceptional and rare case, in that there are special circumstances: *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 FC followed in *Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 SC at p. 194 and *Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 MLJ 271 FC.

In *TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd* [1985] 2 MLJ 45 FC at p. 55, Lee Hun Hoe CJ Borneo, delivering the judgment of the Federal Court, held that the grant of a mandatory injunction is entirely discretionary. Every case must depend essentially on its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly.

In my view, the facts and circumstances of this particular case as alluded to above are exceptional and special and so in the exercise of my discretion I have no hesitation in granting the interlocutory injunction which is mandatory in substance and effect, as this is in line with the principle enunciated by the Federal Court in T.R. Hamzah, *supra*.

(d) Dicretionary Remedy

Conspicuously, there has been no or no significant submission as to whether damages would be an adequate remedy here. That being the case, I can dispense with the endeavour to make a specific finding on this, except to say that the injunctive relief sought by the plaintiffs is discretionary and that such discretion should be exercised according to established judicial principles based on the facts and circumstances of this case.

(e) Conclusion

Applying the foregoing established judicial principles to the facts and circumstances of this case, I hereby allow the plaintiffs' application in encl. (2) with costs. Further in the interest of justice, I would order an early date for the hearing of the originating summons herein.